

RESERVATIONS TO HUMAN RIGHTS TREATIES: PROBLEMATIC ASPECTS RELATED TO GENDER ISSUES

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Abstract. *In this article the author analyses specific reservations that are being done to the international documents for the protection of human rights and whether Vienna Convention on the Law of the Treaties applies to those human rights treaties or not. Also, the author analyses if reservations, which are incompatible with object and purpose of the treaty, can be done or not and what consequences they might bring. For this reason the author describes the practice of the state members under the Convention on the Elimination of All Forms of Discrimination against Women and International Covenant on Civil and Political Rights. These treaties were chosen not only because they laid down the most significant principles of the protection of human rights, but also due to the great number of reservations made to the fundamental provisions of these treaties. The importance of the topic is that in the human rights treaties the implementation of Vienna Convention on the Law of Treaties provisions on reservations brings several issues, even though on theoretical level the regulation of reservations seems unproblematic. Firstly, there is a major group of states (especially Islamic countries, which base their explanation on the incompatibility with Islamic law), which want to become parties to the treaties that protect human rights and make reservations to fundamental provisions of them at the same time. Secondly, the state parties that make objections to the reservations have to decide if the reservation is compatible with the object and purpose of*

the treaty or not. The regulation that is laid down in Vienna Convention on the Law of Treaties creates difficulties for the state parties and withdrawal of reservations seems to be more problematic in reality than it is in theory. In order to find the solutions for the above mentioned issues, the author analyses whether the Vienna Convention on the Law of the Treaties regime works properly within the mechanism of making reservations to the human rights treaties or not, what reservations should be kept invalid under the human rights treaties and what could be the solutions for the most effective protection from the invalid reservations that address fundamental rights of human beings in the human rights law.

Keywords: *human rights, gender issues, reservations, object and purpose of the treaty, Vienna Convention on The Law of Treaties, Convention on the Elimination of All Forms of Discrimination against Women, International Covenant on Civil and Political Rights.*

Introduction

The common interest in the human rights treaties is the accomplishment of providing a high standard protection of human rights.¹ Article 2 of the Universal Declaration of Human Rights states that: “Everyone is entitled to all the rights and freedoms set forth in [this] Declaration, without distinction of any kind, such as race, colour, sex, language, religion...”². These commitments are reflected in international legal instruments including the Convention on the Elimination of All Forms of Discrimination against Women (hereinafter referred to as CEDAW or Convention), International Covenant on Civil and Political Rights (hereinafter referred to as ICCPR), International Covenant on Social and Economical Rights (hereinafter referred to as ICESCR), Convention on the Rights of the Child (hereinafter referred to as CRC), Convention on the Rights of Persons with Disabilities and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, and others.

Even though the state members are obliged to ensure the protection of human rights without any derogation, a significant number of countries have made certain reservations³ to these treaties. The power of making reservations to international treaties grows out of the principle of “sovereignty of states”, so states can claim that they will not be bound with some particular provisions of an international treaty to which they do not give their

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- 1 Korkelia, R. New Challenges to the Regime of Reservations Under the International Covenant on Civil and Political Rights. *European Journal of International Law*. 2000, 13: 3
 - 2 Universal Declaration of Human Rights, adopted 10 December 1948 by the United Nations General Assembly. United Nations [interactive]. New York, 217 A (III). [accessed 2012-12-06]. <<http://www.un.org/Overview/rights.html>>.
 - 3 Article 2 of the VCLT defines “reservation” as a unilateral statement, however phrased or named, made by a State or by an international organization when signing, ratifying, formally confirming, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State or to that organization.

consent.⁴ On the other hand, the international treaties, in particular the multilateral ones, are the results of a crucial need to regulate the relations between states and to provide stability and control on the relations. In this context, it can be said that treaties may lose their effectiveness if states are unwilling to enforce them, in other words, if they make reservations to exclude or to modify the legal effect of certain provisions of the treaty.⁵

It has to be mentioned that the number of reservations made to the fundamental provisions of human rights treaties is very high and only a small number of states have withdrawn the invalid reservations. By making reservations to the fundamental human rights instruments, state parties usually justify themselves that the provisions are incompatible with national laws, religion and (or) traditions. This issue makes the implementation of the human rights treaties more difficult than it seems and causes harmful practises on particular groups of people, as well.

As it was mentioned, many reservations based on national law, religious aspects, traditions and customs are being introduced to human rights treaties, e.g., even though CEDAW provides that a reservation is held to be incompatible with the object and purpose of this convention if at least two thirds of the state parties object to it, the reservations are widely made to the provisions of it. For this reason, CEDAW Committee expressed the view that in principle the provisions of the Vienna Convention on the Law of Treaties (hereinafter referred to as VCLT) on reservations should be followed, observing the requirement of compatibility with the object and purpose of the treaty while making reservations and providing objections to them. VCLT requires reservations not only to be compatible with the object and purpose of the treaty, but also that the reservations would not be prohibited in general or the specific attempted reservation would not be prohibited under the treaty, as well.⁶ However, in practice the issue is more difficult due to the reason that the state parties do not always follow the VCLT provisions while making the reservations, even though these requirements are clearly stated in the most implemented international documents related to the treaty law.

Due to the problems mentioned above, the author presents an analysis of what specific reservations are introduced to the international human rights instruments, which are CEDAW and ICCPR, in terms of how these reservations are being made, what was the reaction of the rest of the state parties to the reservations, what legal consequences those incompatible reservations might bring and what should be the solutions in order to reduce the number of invalid reservations.

4 Yamali, N. How adequate is the law governing reservations to human rights treaties? *Ministry of Foreign Affairs*. [interactive]. Ankara, 2008: 4 [accessed 2013-05-04]. <<http://www.justice.gov.tr/e-journal/pdf/LW7090.pdf>>.

5 Shaw, M.N. *International Law*. 6th. ed. Cambridge: Cambridge University Press, 2008, p. 915.

6 Lindefalk, U. On the Meaning of the 'Object and Purpose' Criterion, in the Context of the Vienna Convention on the Law of Treaties. Article 19. *Nordic Journal of International Law*. 2003, 50: 434.

1. Reservations under the Convention on the Elimination of All Forms of Discrimination against Women

CEDAW was adopted by the General Assembly in 1979 and has 187 states parties⁷. In various sources the CEDAW is often described as an international bill of rights for women. The CEDAW seeks to address social, cultural and economic discrimination against women, declaring that states should endeavour to modify social and cultural patterns of conduct that stereotype either sex or put women in an inferior position.⁸ Furthermore, by accepting the CEDAW, states commit themselves to undertake a series of measures to end discrimination against women in all forms. The measures include incorporating the principle of equality of men and women in their legal system, abolishing all discriminatory laws and adopting appropriate ones prohibiting discrimination against women, establishing tribunals and other public institutions to ensure the effective protection of women against discrimination.

Even though the CEDAW has a great number of state members, it is also the treaty with the highest number of reservations. By making reservations on very important provisions of this Convention, states do not implement the provisions in their national legal system. Therefore, the implementation of the fundamental values provided in this Convention is questionable in those countries (especially the Islamic ones⁹). For this reason, it is necessary to analyse deeper the consequences of the reservations to this Convention.

It has to be mentioned that in 1998 the CEDAW Committee¹⁰ adopted a statement on reservations stating that “reservations affect the efficacy of the Convention, whose objective is to end discrimination against women and to achieve de jure and de facto equality for them. The Committee explained that by entering a reservation, a state indicates its unwillingness to comply with an accepted human rights norm”.¹¹ In its 2003 preliminary report, the Committee held the view that in principle the provisions of the VCLT on reservations should be followed, observing the requirement of compatibility

7 Yamali, N. How adequate is the law governing reservations to human rights treaties? *Ministry of Foreign Affairs*. [interactive]. Ankara, 2008: 4 [accessed 2013-04-30]. <<http://www.justice.gov.tr/e-journal/pdf/LW7090.pdf>>.

8 Rishmawi, M. *The Revised Arab Charter on Human Rights: A Step Forward?* Oxford: Oxford University Press, 2005, p. 368.

9 Islamic reservations have certain features: they are usually made to human rights treaties by Muslim countries, based on Islamic law (Shariah or Quaran).

10 The United Nations Committee on the Elimination of Discrimination against Women (CEDAW), an expert body established in 1982, is composed of 23 experts on women’s issues from around the world. The Committee’s mandate is very specific: it watches over the progress for women made in those countries that are the States parties to the 1979 Convention on the Elimination of All Forms of Discrimination against Women. A country becomes a State party by ratifying or acceding to the Convention and thereby accepting a legal obligation to counteract discrimination against women. The Committee monitors the implementation of national measures to fulfil this obligation.

11 Rishmawi, M. *The Revised Arab Charter on Human Rights: A Step Forward?* Oxford: Oxford University Press, 2005, p. 368.

with the object and purpose of the treaty. This Committee emphasized the fact that the issue of reservations is essential within the jurisdiction of States, notwithstanding the special character of the human rights treaties and that reservations form an integral part of the consent to be bound by a State.¹² The view on the suitability of the VCLT to the reservations under this Convention also conforms to the Professor Pellet's view that the VCLT regime is adequate for human rights treaties and that one of its commendable features is that it leaves the parties to the treaty free to decide on reservations.¹³ As to the researches of international law, author M. Fitzmaurice follows the opinion stating that the Committee on the Elimination of Discrimination against Woman has adopted a similarly cautious approach.¹⁴ As observed by Schopp-Schilling, the Committee on the Elimination of Discrimination against Woman tried several approaches, such as requesting States to withdraw, reconsider or explain offending reservations and not to submit reservations against the object and purpose of the Convention. This request has "not [been] heeded" by the newly ratifying States.¹⁵ However, Schopp-Schilling more positively states that some of the new Parties explain their reservations in a fairly precise manner. However, at the same time "these explanations may not be acceptable and do not solve the problem of the impermissibility of these reservations."¹⁶

As to the concept of reservations, the CEDAW permits ratification subject to reservations, provided that the reservations are not incompatible with the object and purpose of the Convention. It has been argued that the determination of the "object and purpose" is a difficult process and the thought that the parts of the treaties that do not constitute the "object and purpose" can be dispensed with through valid reservations places human rights regimes in a precarious position.¹⁷

A number of States enter reservations to particular articles on the ground that national law, traditions, religion or culture are not congruent with CEDAW principles, and purport to justify the reservation on that basis.¹⁸ The highest number of reservations has been made to articles 2 and 16¹⁹, which the CEDAW Committee considers as core articles of the Convention and which in its view is impermissible. Therefore, specific

12 Kjerum, M. Approaches to Reservations to Human Rights Treaties. *Singapore Year Book of International Law and Contributors*. 2006, 10(133): 67.

13 Pellet, A. First Report on the Law and Practice Relating to Reservations to Treaties, 4 7th Sess., *UN Doc. A/CN.4/470*, in particular para. 69.

14 Fitzmaurice, M. On the Protection of Human Rights, the Rome Statute and Reservations to Multilateral Treaties. *Singapore Year Book of International Law and Contributors*. 2006, 10(133): 156.

15 Schopp-Schilling, H. B. Reservations to the Convention on the Elimination of All Forms of Discrimination Against Woman: Unresolved Issue or (No) "New Developments?" in Reservations to Human Rights Treaties. *The Journal of Legal Studies*. 2000 supra note 2 at 3.

16 Fitzmaurice, M. On the Protection of Human Rights, the Rome Statute and Reservations to Multilateral Treaties. *Singapore Year Book of International Law and Contributors*. 2006, 10(133): 156.

17 Clark, B. The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women. *American Journal of International Law*. 1991, 85(2): 281.

18 Krivenko, E. Y. *Women, Islam and International Law*. Geneva: Graduate Institute of International and Development Studies. 2009: 111.

19 Based on the information of 27/05/2013.

states reservations to these relevant articles, their legality (compatibility with the object and purpose of the treaty) and consequences will be analysed further.

Article 2 of the Convention is one of the main articles because it provides all the basic principles of the implementation of the convention's provisions. According to this article, the state parties agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and decide to take all the appropriate measures to adopt appropriate legislative and legal protections to the rights provided in the Convention. However, some states enter a reservation to this article, although their national constitutions or laws prohibit discrimination as such. Moreover, some reservations are drawn so widely that their effect cannot be limited to specific provisions in the Convention.²⁰

The analysis of the reservations made by different member states of the Convention²¹ shows that most of the state parties made reservations to this article for the following reasons. First of all, the reserving states claim that relevant provisions of Article 2 conflict with Shariah law²². Secondly, it conflicts with constitutional stipulations relative to succession to the throne and law relating to succession to chieftainship²³. In addition, it conflicts with the provisions of the Family Code, e.g. the Government of the People's Democratic Republic of Algeria declared that they are prepared to apply the provisions of this article on condition that they do not conflict with the provisions of the Algerian Family Code. The Kingdom of Morocco made Declaration with regard to Article 2 because certain provisions in the Moroccan Code of Personal Status contained different rights conferred on men which may not be infringed upon or abrogated because they derive primarily from the Islamic Shariah, which strives, among its other objectives, to strike a balance between the spouses in order to preserve the coherence of family life.

Firstly, it is necessary to mention that the concept of "equality" in Islamic law is comparatively different from the provisions of Article 2 of the CEDAW and the reservations made thereto by Islamic States in many respects reflect this difference in perception. To begin with, Shariah recognizes the legal status of women and men as being equal before Allah and the Ummah (Islamic community). This "equality" is, however, not conceived in an absolute sense. All persons are considered equal before Allah, with no distinction as to gender, language, race or religion. "Equality" is also a key principle that is respected even in all dealings between people (*mu'āmalāt*). This view of equality of all human beings (*musāwāt*) is also an expression of the Shari'ah concept of dignity (*karāmah*). It accepts the unity of mankind and the dignity of all human beings.²⁴ It is very important to note that this equality in religion is not the same

20 *United Nations Entity for Gender Equality and the Empowerment of Women: Division for the Advancement of Women. Department of Economic and Social Affairs* [interactive]. New York, 2000-2009. [accessed 2013-05-20]. <<http://www.un.org/womenwatch/daw/cedaw/reservations.htm>>.

21 Bahrain, Bangladesh, Egypt, Iraq, Libya, Saudi Arabia.

22 Especially Islamic countries such as Bahrain, Bangladesh, Egypt, Iraq, Libya and Saudi Arabia, which made reservations based on Shariah law.

23 The Kingdom of Lesotho

24 Sawad, A. A. *Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations*. New Zealand: University of Otago, 2008, p. 85.

as it is in society. According to Shariah, women and men are not equal in their marital life and also in the context of family relations. Islamic family law governs legal issues such as marriage, divorce, child custody and inheritance. These legal issues deeply affect the daily lives of women, since they order social relations and define the rights and duties of women with respect to fundamental social and familial practices.²⁵ This practice seems to be opposite to the Western traditions, e.g. the right to divorce only by men initiative, prohibition of adoption, punishments, such as stoning to death, for adultery and others. However, this practice has not been the same during the ages. When this status is compared to that of Muslim women during the life of the Prophet, the contrast is shocking. Early Muslim women were actively involved in every aspect of life of the nascent Muslim society. They included business women, poets, jurists, religious leaders and even warriors.²⁶ However, during the years the situation in Islamic countries has changed so dramatically that these states have to make reservations in order not to ruin their traditions and customs.

Secondly, it is a question whether reservations under this article do not violate the object and purpose of the Convention. The member states who are willing to join this international document declare that they are willing to comply with the content of the articles on condition that such compliance does not run counter to the Islamic Shariah law. Countries, such as Iraq, add that approval of and accession to this Convention shall not mean that the Republic of Iraq is bound by neither the provisions of Article 2, paragraphs (f) and (g), of Article 9, paragraphs 1 and 2, nor of Article 16 of the Convention. The reservation to this last-mentioned article shall be without prejudice to the provisions of the Islamic Shariah according women rights equivalent to the rights of their spouses, so as to ensure a just balance between them. The question then arises, if these kinds of reservations are valid at all in terms of explanation of the CEDAW Committee that Articles 2 and 16 are considered by the CEDAW Committee to be core provisions of the Convention or not. The answer differs to the position who can determine what are the core provisions under this treaty and who can decide whether the reservations are valid or not. Even though in *Belilos v. Switzerland*²⁷ and *Loizidou v. Turkey*²⁸ cases the European Court of Human Rights took an alternative approach and decided by itself that certain reservations were invalid and, therefore, stated that it has a jurisdiction not only to interpret reservations made by the states, but also to decide on the validity of them, VCLT does not explicitly suggest this approach. It can only be seen as an alternative way on the determination of the validity of reservation. In VCLT article 20, it is stated that the rest of the state parties to the treaty can raise the objections to the reservation incompatible with the object and purpose of the treaty. If the state parties decide that the reservation is incompatible with the object and purpose, they can choose either to be bound by the treaty in the relations with the reserving state or preclude the entry into force of the treaty as between the objecting and reserving states. Under this Convention

25 Al-Hibri, A. Islam, Law and Custom: Redefining Muslim Women's Rights. *American University International Law Review*. 1997: 2.

26 *Ibid.*, p. 2.

27 *Belilos v. Switzerland Case*, ECHR (1988), Series A, No. 132.

28 *Loizidou v. Turkey Case*, ECHR (1995), Series A, No. 310.

several states made objections regarding the reservations made to Article 2, e. g. with regard to reservations made by the Democratic Republic of Korea, which stated that it does not consider itself bound by the provisions of paragraph (f) of Article 2, Austria stated that it objects to the reservations in respect of paragraph (f) of Article 2 and paragraph (2) of Article 9. Both paragraphs refer to the basic aspects of the Convention that are legislation to abolish existing discrimination against women and a specific form of discrimination, such as the nationality of children.²⁹

This part of the Article 2 referred to the basic aspects of the Convention – to abolish existing discrimination against women and a specific form of discrimination, such as the nationality of children. The Government of Denmark decided that the reservations made by the Government of Niger are not in conformity with the object and purpose of the Convention³⁰. The provisions in respect of which Niger made reservations cover fundamental rights of women and establish key elements for the elimination of discrimination against women. Therefore, the reservation is incompatible with the object and purpose of the Convention. However, the objecting states expressed their willingness for the reserving state only to reconsider its reservations to the Convention.³¹ This declaration did not oblige the reserving state in any matter.

Further question to discuss is what steps should be taken if the state parties clearly express their objections that reservation to the Article 2 of the Convention is incompatible with the object and purpose of the treaty. The next question would be what consequences these reservations bring when other member states think they are incompatible with the spirit of the Convention. There are several solutions under VCLT regime. Firstly, the objecting states can choose to maintain relationship with the reserving state. Secondly, the objecting states might reject to maintain the relations with the reserving state. Thirdly, the objecting states can continue being into relation with the reserving state except the provisions to those reservations were made. According to the author's opinion, it is very surprising that after expressed opinion about the incompatible reservations, the objecting states choose the third way. Therefore, the ratio of those objecting states should be analysed further.

The analysis of the positions of objecting states³² shows that most of the governments of state parties recommend the reserving state to reconsider its reservations to the Convention. Moreover, states express their willingness not to preclude the entry into force in its entirety of the Convention between the objecting state and reserving state. Generally, the objecting state adds that the Convention will thus become operative between the two states without reserving state benefiting from its reservations. As the

29 *United Nations Entity for Gender Equality and the Empowerment of Women: Division for the Advancement of Women. Department of Economic and Social Affairs* [interactive]. New York, 2000-2009. [accessed 2013-05-20]. <<http://www.un.org/womenwatch/daw/cedaw/reservations.htm>>.

30 The Government of the Republic of Niger expresses reservations with regard to Article 2, paragraphs (d) and (f), concerning the taking of all appropriate measures to abolish all customs and practices which constitute discrimination against women, particularly in respect of succession.

31 *United Nations Treaty Collections. United Nations* [interactive]. New York, 2013 [accessed 2013-04-30]. <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en>.

32 Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany.

state parties do not have to base their declarations, it is clear that there are some political or other aspect why state parties let reserving states enter the treaties with these kinds of reservations that would have a great impact on the level of the protection of human rights.

Other important provisions are laid down in Article 16, which provides that all parties to the present Convention shall take all appropriate measures to eliminate discrimination against women. It also specifies the main rights that are the key to the gender equality, relating to marriage and family relations. These rights are the same right to enter into marriage, the same right to choose a spouse freely and to enter into marriage only with their free and full consent, the same rights and responsibilities during marriage and at its dissolution, the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children. In all cases the interests of the children shall be paramount and more.

Neither traditional, religious or cultural practice, nor incompatible domestic laws and policies can justify violations of the Convention. The Committee also stated that it remained convinced that reservations to Article 16, whether lodged for national, traditional, religious or cultural reasons, are incompatible with the Convention and, therefore, impermissible and should be reviewed and modified or withdrawn.³³ However, a large number of the state parties also made reservations to Article 16,³⁴ e.g. the Arab Republic of Egypt made the reservation “to the text of Article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic Shariah’s provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. The Shariah restricts the wife’s rights to divorce by making it contingent on a judge’s ruling, whereas no such restriction is laid down in the case of the husband.”³⁵ The Republic of India made declarations and reservations stating that it would abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent with regard to Article 16 (2). It declares that although it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy.³⁶ The Government of the Republic of Maldives reserves its right to apply Article 16 of the Convention concerning the equality of men and women in all matters relating to marriage and family relations

33 *United Nations Entity for Gender Equality and the Empowerment of Women: Division for the Advancement of Women. Department of Economic and Social Affairs* [interactive]. New York, 2000-2009. [accessed 2013-05-20]. <<http://www.un.org/womenwatch/daw/cedaw/reservations.htm>>.

34 Countries such as Algeria, Bahrain, Egypt, France, India, Iraq, Israel, Jordan, Kuwait, Lebanon, Malaysia, Maldives, Malta, Federated States of Micronesia, Niger, Oman, Qatar, Republic of Korea, Singapore, Syrian Arab Republic, Tunisia and others.

35 *United Nations Treaty Collections. United Nations* [interactive]. New York, 2013 [accessed 2013-04-30]. <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en>.

36 *United Nations Entity for Gender Equality and the Empowerment of Women: Division for the Advancement of Women. Department of Economic and Social Affairs* [interactive]. New York, 2000-2009. [accessed 2013-05-20]. <<http://www.un.org/womenwatch/daw/cedaw/reservations.htm>>.

without prejudice to the provisions of the Islamic Shariah, which govern all marital and family relations of the 100 percent Muslim population of the Maldives.³⁷

As to the Article 16 and reservations made to it by stating that it is inconsistent with the Shariah law, it brings following consequences. In Islamic countries female infanticide and prenatal sex selection, early marriage, dowry-related violence, female genital mutilation/cutting, crimes against women committed in the name of “honour”, and maltreatment of widows, including inciting widows to commit suicide, are forms of violence against women that are considered harmful traditional practices and may involve both family and community. While data has been gathered on some of these forms, this is not a comprehensive list of such practices. Other practices have been highlighted by States (e.g. in their reports to human rights treaty bodies and in follow-up reports on implementation of the Beijing Platform for Action³⁸) by the Special Rapporteur on violence against women, its causes and consequences and by the Special Rapporteur on harmful traditional practices. They include the dedication of young girls to temples, restrictions on a second daughter’s right to marry, dietary restrictions for pregnant women, forced feeding and nutritional taboos, marriage to a deceased husband’s brother and witch hunts.³⁹

Hundreds, if not thousands, of women are murdered by their families each year in the name of family “honour”.⁴⁰ The exact statistics of women who suffer this extreme violation in the name of tradition is not established as the murders are not reported nor are the perpetrators brought to book, as the killings are considered to be heroic acts and justified by the society, in some instances even with rewards to the perpetrators. In these cases, women are seen as a vessel of the family reputation.⁴¹

Crimes against women committed in the name of “honour” may occur within the family or within the community. These crimes are receiving increased attention but remain underreported and under-documented. The most severe manifestation is murder – the so-called “honour killings”. UNFPA has estimated that 5,000 women are murdered by family members each year in “honour killings” around the world. A government report noted that “karo-kari” (“honour killings”) claimed the lives of 4,000 men and women between 1998 and 2003 in Pakistan, and that the number of women killed was more than double the number of men.⁴² As to the consequences of the reservations made

37 *United Nations Treaty Collections. United Nations* [interactive]. New York, 2013 [accessed 2013-04-30]. <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en>.

38 Beijing Declaration and Platform for Action Adopted by the Fourth World Conference on Women: Action for Equality, Development and Peace, Beijing, 15th September, 1995.

39 *In-depth study on all forms of violence against women*. Report of the Secretary-General. [interactive]. United Nations, New York, 2006, A/61/122/Add.1:39 [accessed 2013-03-23]. <<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/419/74/PDF/N0641974.pdf?OpenElement>>.

40 Ageng’o, C. *Harmful Traditional Practises in Europe, Judicial Interventions*. London: Yale University Press. 2009, p. 11.

41 Honor killings have been reported in Bangladesh, Great Britain, Brazil, Ecuador, Egypt, India, Israel, Italy, Jordan, Pakistan, Morocco, Sweden, Turkey and Uganda, according to the reports submitted to the United Nations Commission on Human Rights.

42 Kogacioglu, D. The Tradition Effect: Framing Honour Crimes in Turkey, Differences. *A Journal of Feminist Cultural Studies*. 2004, 15(2): 119.

to the Article 16, the rest of the state parties expressed their objections by stating that the Article 16 contains main provisions of the treaty and, therefore, the reserving states violate the object and purpose of the treaty. However, the objecting states⁴³ declared that they want to be bound by the Convention's provisions and maintain relations with the objecting state except the norms covered by the reservations.

Even though the CEDAW provides that a reservation is held to be incompatible with the object and purpose of this Convention if at least two thirds of the States parties object to it, the reservations are widely made to the provisions of it, especially to the Articles 2 and 16. For this reason, the CEDAW Committee expressed the view that in principle the provisions of the VCLT on reservations should be followed, observing the requirement of compatibility with the object and purpose of the treaty while making reservations and providing objections to them. However, according to the examples analysed above, the situation is more difficult because the state parties do not follow the VCLT provisions and make reservations that are incompatible with the object and purpose of the treaty. If we follow the VCLT regime, the state parties which are the real observers of the treaty have a duty to express their willingness regarding the obligations for the new members within incompatible reservations. However, it is seen from the objections that states do not want to cut their relationships with the reserving states and usually choose the diplomatic way to maintain the relations in terms of the Convention. For this reason, the effectiveness of implementation of human rights requirements certainly has many doubts in particular countries.

2. Reservations under the International Covenant on Civil and Political Rights

The rights protected in the ICCPR are rights “rooted in basic democratic values and freedoms”. The Covenant seeks to promote “the inherent dignity and... equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world”. To further this goal, the Covenant provides twenty seven articles which give individuals around the world various civil and political rights “without regard to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”⁴⁴

As of 8th August, 2012, 74 signatories and 167 State parties to the International Covenant on Civil and Political Rights⁴⁵ entered 150 reservations of varying significance to their acceptance of the obligations of the Covenant. Some of these reservations excluded the duty to provide and guarantee particular rights in the Covenant. Others were

43 Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany.

44 *The Office of the United Nations High Commissioner for Human Rights* [interactive]. Geneva, 1996-2013. [accessed 2013-05-20]. <<http://www2.ohchr.org/english/law/ccpr.htm>>.

45 *United Nations Treaty Collections*. [interactive]. [accessed on 4-30-2013]. <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

formulated in more general terms, often directed to ensuring the continued paramount of certain domestic legal provisions. The number of reservations, their content and their scope may undermine the effective implementation of the Covenant and tend to weaken respect for the obligations of States parties. It is important for States parties to know exactly what obligations they and other States parties have in fact undertaken. In addition, the Human Rights Committee, in the performance of its duties under either Article 40 of the Covenant or under the Optional Protocols, must know whether a state is bound by a particular obligation and to what extent. This will require a determination as to whether a unilateral statement is a reservation or an interpretative declaration and a determination of its acceptability and effects.

Article 26 on equality and non-discrimination is subject to 6 reservations, two of which have been objected to by other states⁴⁶. There is only one reservation (in France) to the minority rights provision in Article 27 and even that reservation has been contested by a way of objection. Three hereditary monarchies have entered a reservation in respect of Article 3 (equal rights of men and women) in the issue of succession to the throne. Kuwait's more general reservation to Article 3 has been subject to objections by other states.

In order to be more specific, reservations made by state parties, those that are very close to the topic of this article, have to be mentioned further. Islamic countries usually make reservations that directly relate to the cultural and religion aspects.

Attention has to be paid to the 46 Islamic States which have ratified the ICCPR, 14 of which have formulated reservations.⁴⁷ The reservations based on equality are as follows:

- (a) Algeria: reservation to Article 23 paragraph (4) (on equality of rights and responsibilities of married spouses);
- (b) Bahrain: reservations to Article 3 (equality of men and women in civil and political rights), Article 18 (freedom of religion) and Article 23 (family and marital rights);
- (d) Kuwait: reservations to Article 2 paragraph (1) (guarantee of all rights in the Covenant without discrimination of any kind), Article 3 (equality of men and women in civil and political rights), Article 23 (equal rights and responsibilities of marital spouses);
- (f) Mauritania: reservation to Article 23 paragraph (4) (equal rights and responsibilities of marital spouses).⁴⁸

Further, the Government of Pakistan should be mentioned. It acceded to the UN's International Covenant on Civil and Political Rights (ICCPR) on 23 June 2010. Upon ratification, Pakistan entered numerous reservations, which relate to Articles 3, 6, 7,

46 General Comment No. 24: Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations Under Article 41 of the Covenant. 1994.11.04. ICCPR/C/21/Rev.1/Add.6, General Comment No. 24. (General Comments).

47 *United Nations Treaty Collections. United Nations* [interactive]. New York, 2013 [accessed 2013-04-30]. <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtidsg_no=IV-8&chapter=4&lang=en>.

48 *Ibid.*

12, 13, 18, 19, 25 and 40 of the Covenant. As to the reservations that were entered in relation to Articles 3 (equal right of men and women), “The Islamic Republic of Pakistan declares that the provisions of Articles 3 shall be so applied to the extent that they are not repugnant to the Provisions of the Constitution of Pakistan and the Shariah laws.”⁴⁹

Therefore, the question arises whether the reservations are compatible with the international law and the object and purpose of the treaty. It has to be noted that in General Comment No. 24, the UN’s Human Rights Committee has laid down general rules on incompatibility of reservations with the ICCPR. As an example, the reservation under Article 3 made by Islamic Republic of Pakistan is unspecific. The General Comment No. 24 states that “it is desirable for a State entering a reservation to indicate in precise terms the domestic legislation or practices which it believes to be incompatible with the Covenant obligation reserved.”⁵⁰ Moreover, the reservation is not transparent. The reservation refers to a domestic legal document which is not easily understood by other State parties (states, which have been exceeded to the Covenant) and which is subject to changes and interpretation.

It has been doubtful whether the hierarchy of norms is lawful at all. By indicating that the mentioned ICCPR articles only apply as far as they are in line with Pakistan’s Constitution, the reservation introduces a de facto hierarchy of norms by which national law supersedes international obligations.

No real international rights or obligations have thus been accepted. This is contrary to what the General Comment No. 24 requires. A leading commentary on the VCLT notes that “reservations aimed at preserving the integrity of internal law may go against a treaty’s object and purpose in view of their often undetermined and sweeping nature.”⁵¹

Pakistan’s far-reaching reservations do not pass these tests, and, therefore, may be regarded as unlawful and inapplicable. Such reservations are damaging in undermining the application of the ICCPR in Pakistan’s legal and political practice and may also expose Pakistan to objections from other States which are parties to the treaty. Therefore, Pakistan’s reservations to the ICCPR are incompatible with international law.

Given the consequences of impermissible reservations, it would be useful for the Government of Pakistan to consider withdrawing its reservations. If the Government decides not to withdraw all reservations, the remaining ones could be made specific and not subject to domestic legislation. The Government should report to the UN Human Rights Committee and benefit from the Committee’s expertise in identifying which areas of Pakistani legislation may need amendments in the light of the ICCPR obligations.⁵²

49 *United Nations Treaty Collections. United Nations* [interactive]. New York, 2013 [accessed 2013-04-30]. <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en>.

50 Pakistan’s Reservations to the International Covenant on Civil and Political Rights. *Briefing Paper*. 2004, 4: 3.

51 Villiger, M. Commentary on Vienna Convention on the Law of Treaties. *International Journal of Law AJIL* 65. 2009: 272, para 13.

52 Villiger, M. Commentary on Vienna Convention on the Law of Treaties. *International Journal of Law AJIL* 48. 2009: 4.

In the light of the obligations under the treaty, it is worth to mention the objections made by the other state parties. They considered that the reservations by the Islamic Republic of Pakistan are incompatible with the object and purpose of the International Covenant on Civil and Political Rights. The governments of the state parties recall that, according to customary international law as codified in the VCLT, a reservation incompatible with the object and purpose of a treaty is not permitted.⁵³ It is in the common interest of States that treaties to which they have chosen to become party are respected, as to their object and purpose, by all parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties. Furthermore, the other states consider that the Islamic Republic of Pakistan, through its reservations, is purporting to make the application of the Covenant subject to the provisions of general domestic law in force in the Islamic Republic of Pakistan. As a result, it is unclear to what extent the Islamic Republic of Pakistan considers itself bound by the obligations of the Covenant and, therefore, raises concerns to the commitment of the Islamic Republic of Pakistan to the object and purpose of the Covenant. Moreover, the parties consider that the reservations to the Covenant are subject to the general principle of treaty interpretation, pursuant to Article 27 of the Vienna Convention of the Law of Treaties, according to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. It is worth to mention that overall the other state parties expressed the hope that the Islamic Republic of Pakistan will withdraw its reservations. However, the objection shall not preclude the entry into force of the Covenant between them and the Islamic Republic of Pakistan.⁵⁴

To sum up, at least two different forms of state practice emerge under the ICCPR: the practice of reserving states in entering, modifying and withdrawing their reservations and the practice of the Human Rights Committee in relation to reservations by states. As it was mentioned before, the possibility to consider a state as a party to the ICCPR without the benefit of its impermissible reservation is absent from the text of the VCLT. However, this silence can be attributed to that of other states in objecting to the reservations by reserving states. A third form of state practice could be said to emerge through states' action or inaction in respect to the pronouncements made by the fact that the VCLT only regulates the consequences of permissible reservations and objections to them. The Human Rights Committee in its General Comment No. 24 on reservations has expressed its opinion about certain objections by state parties to reservations made, i.e. by Pakistan. Subsequent to the adoption of the General Comment, objections by states have become even more explicit in treating a state that enters a reservation that is incompatible with the object and purpose of the ICCPR as a state party but without the benefit of its impermissible reservation.

53 Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Estonia, Finland, Germany, Hungary, Denmark, Ireland, Italy, Latvia, Norway, Poland, Portugal, Slovakia, Spain, Sweden, Switzerland and Uruguay made objections to the reservations of Pakistan.

54 *United Nations Treaty Collections. United Nations* [interactive]. New York, 2013 [accessed 2013-04-30]. <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en>.

Conclusions

1. One of the most problematic issues related to reservations is the determination/establishment of the object and purpose of the treaty. As there is no any uniform definition of the object and purpose of the treaty, Article 19 (c) of VCLT explains it as “core obligations” of the treaty. Although the VCLT does not give a direct answer on who and how has to decide if the particular provision of the treaty contains core obligations or not, the analysis of CEDAW and ICCPR allows to make the suggestions as follows. Firstly, every treaty should have a clear and distinct “object and purpose” in order to distinguish what reservation is permissible and reserving state would not deny the obligations to the fundamental provisions of the treaty. Furthermore, as there are state parties who can object to the reservations and decide the validity of the reservation (its conformity with the object and purpose), the monitoring bodies have to state clearly what provisions are considered to be essence of the treaty in their comments.

2. Taking into consideration the CEDAW and practice of the state parties, most reservations have been made to Article 2 (relating to equality in general) and Article 16 (specifies the main rights, which are the key elements to the gender equality, relating to marriage and family relations) based on Islamic law. Therefore, strong positions of reserving states often led by religion justification (inconformity with Shariah law) raised certain issues and violations of human rights in general and, especially, women rights, such as early marriages, female genital mutilation and others. The analysis of these harmful practices against women revealed that there is a close link between the reservations made by the states based on the cultural and religion aspects and these harmful traditional practices. For this reason, other state parties that give objections to the reservations should formulate them in a stricter manner and express their strong position about the reservations that violate the object and purpose of the treaty. There is a possibility that according to these strict objections the reserving states would withdraw them.

3. As to the ICCPR, the majority of the states made reservations that relate gender issues to the Article 23 paragraph (4) (on equality of rights and responsibilities of married spouses), Article 3 (on equality of men and women in civil and political rights) and Article 23 (on family and marital rights). Attention has to be paid to the 46 Islamic States which have ratified the ICCPR, where 14 of them have formulated reservations to these abovementioned articles by justifying the incompatibility of the provisions with the Islamic regulation. Even though all other state parties objected to these specific reservations and expressed the hope that those reservations should be withdrawn, there were only several states that withdraw those reservations based on Islamic law. The provisions to which reservations were made clearly established gender equality. By making reservations to them, states parties denied the essence of the equality between men and women established in the ICCPR and expressed their strong position that they are not ready to accept and implement these guarantees in their national system.

4. The most serious issue concerns those states that are already parties to the human rights treaties with the reservations made to the fundamental provisions of them. In

this case, the role of the monitoring bodies and international institutions is essential. By making the reports on how the state parties implement treaty norms and how the mechanism of protection works in their national legal system, UN monitoring bodies inform other treaty members about the relevant situation in other countries. However, the problem is that those reports do not have a binding effect on states as they can only give recommendations. Therefore, the decisions of *Belilos v. Switzerland* and *Loizidou v. Turkey* cases are important. According to them, not only the monitoring bodies, but also a court has a jurisdiction to determine validity of reservations. It is important that these cases went beyond the VCLT regime and showed different approach that the institutions of European Convention on Human Rights can not only interpret reservations, but also decide on the validity of certain reservations. Therefore, the court also could be a sufficient body who can make a binding decision whether particular reservation to human rights treaties is valid or not.

References

- Ageng'o, C. *Harmful Traditional Practises in Europe, Judicial Interventions*. London: Yale University Press, 2009.
- Al-Hibri, A. Islam, Law and Custom: Redefining Muslim Women's Rights. *American University International Law Review*. 1997.
- Beijing Declaration and Platform for Action Adopted by the Fourth World Conference on Women: Action for Equality, Development and Peace, Beijing, 15th September, 1995.
- In-depth study on all forms of violence against women*. Report of the Secretary-General. [interactive]. United Nations, New York, 2006, A/61/122/Add.1:39[accessed 2013-03-23]. <<http://daccess-dds-ny.un.org/doc/UN-DOC/GEN/N06/419/74/PDF/N0641974.pdf?OpenElement>>.
- Belilos v. Switzerland Case*, ECHR (1988). Series A, No. 132.
- Clark, B. The Vienna Convention Reservations Regime and the Convention on Discrimination Against Women. *American Journal of International Law*. 1991, 85(2).
- Convention on the Elimination of All Forms of Discrimination against Women, 18th December, 1979. General Assembly Resolution 34/180, United Nations.
- Fitzmaurice, M. On the Protection of Human Rights, the Rome Statute and Reservations to Multilateral Treaties. *Singapore Year Book of International Law and Contributors*. 2006, 10(133).
- General Comment No. 24: Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 1994.11.04. ICCPR/C/21/Rev.1/Add.6, General Comment No. 24. (General Comments).
- International Covenant on Civil and Political Rights, United Nations General Assembly Resolution 2200A (XXI); 21 United Nations General Assembly Official Records, Supplement Number 16 at 52; (1967) International Legal Materials.
- Yamali, N. *How adequate is the law governing reservations to human rights treaties?* Ministry of Foreign Affairs. [interactive]. Ankara, 2008 [accessed 2013-05-04]. <<http://www.justice.gov.tr/e-journal/pdf/LW7090.pdf>>.
- Kjerum, M. Approaches to Reservations to Human Rights Treaties. *Singapore Year*

- Book of International Law and Contributors*. 2006, 10(133).
- Kogacioglu, D. The Tradition Effect: Framing Honour Crimes in Turkey, Differences. *A Journal of Feminist Cultural Studies*. 2004, 15(2).
- Korkelia, R. New Challenges to the Regime of Reservations Under the International Covenant on Civil and Political Rights. *European Journal of International Law*. 2000, 13.
- Krivenko, E. Y. *Women, Islam and International Law*. Geneva: Graduate Institute of International and Development Studies, 2009.
- Lindefalk, U. On the Meaning of the ‘Object and Purpose’ Criterion, in the Context of the Vienna Convention on the Law of Treaties, Article 19. *Nordic Journal of International Law*. 2003, 50.
- Loizidou v. Turkey Case*, ECHR (1995). Series A, No. 310.
- Pakistan’s Reservations to the International Covenant on Civil and Political Rights. *Briefing Paper*. 2004, 4.
- Pellet, A. First Report on the Law and Practice Relating to Reservations to Treaties, 4 7th Sess., *UN Doc. A/CN.4/470*.
- Rishmawi, M. *The Revised Arab Charter on Human Rights: A Step Forward?* Oxford: Oxford University Press, 2005.
- Sawad, A. A. *Reservations to Human Rights Treaties and the Diversity Paradigm: Examining Islamic Reservations*. New Zealand: University of Otago, 2008.
- Schopp-Schilling, H. B. Reservations to the Convention on the Elimination of All Forms of Discrimination Against Woman: Unresolved Issue or (No) “New Developments?” in Reservations to Human Rights Treaties. *The Journal of Legal Studies*. 2000.
- Shaw, M.N. *International Law*. 6th. ed. Cambridge: Cambridge University Press, 2008.
- The Office of the United Nations High Commissioner for Human Rights* [interactive]. Geneva, 1996-2013. [accessed 2013-05-20]. <<http://www2.ohchr.org/english/law/ccpr.htm>>.
- Universal Declaration of Human Rights, adopted 10 December 1948 by the United Nations General Assembly*. United Nations [interactive]. New York, 217 A (III). [accessed 2012-12-06]. <<http://www.un.org/Overview/rights.html>>.
- United Nations Entity for Gender Equality and the Empowerment of Women: Division for the Advancement of Women. Department of Economic and Social Affairs* [interactive]. New York, 2000-2009. [accessed 2013-05-20]. <<http://www.un.org/womenwatch/daw/cedaw/reservations.htm>>.
- United Nations Treaty Collections. United Nations* [interactive]. New York, 2013 [accessed 2013-04-30]. <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en>.
- Vienna Convention on the Law of Treaties. *United Nations, Treaty Series*, vol. 1155, 1969.
- Villiger, M. Commentary on Vienna Convention on the Law of Treaties. *International Journal of Law AJIL* 65. 2009.

IŠLYGOS ŽMOGAUS TEISIŲ APSAUGOS SUTARTIMS: PROBLEMINIAI ASPEKTAI, SUSIJĘ SU LYČIŲ LYGYBĖS KLAUSIMAIS

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Santrauka. Šio straipsnio tikslas – atrasti ryšį tarp valstybių daromų išlygų žmogaus teisių apsaugos sutartims, kurios yra susijusios su lyčių lygybės problemomis, ir vykdomos žalingos praktikos prieš moteris, kuri yra paremta tradicijomis ir religiniais papročiais. Minėta praktika daroma žala konkrečioms asmenų grupėms yra viena opiausių problemų tarptautinėje erdvėje pastaruoju laikotarpiu. Autorė šiame straipsnyje nagrinėja Konvencijos dėl visų formų diskriminacijos panaikinimo moterims ir Tarptautinio pilietinių ir politinių teisių pakto atžvilgiu valstybių vykdomą praktiką. Pažymėtina, kad šios sutartys buvo pasirinktos nagrinėti būtent todėl, kad jos nustato svarbiausius lyčių lygybės apsaugos reguliavimo principus, taip pat dėl to, kad valstybių padarytos išlygos šioms sutartims sudaro itin didelį skaičių. Atkreiptinas dėmesys, kad valstybės, darydamos minėtąsias išlygas, bando pateisinti šiuos savo veiksmus tuo, kad sutarčių, kurių narėmis jos nori tapti, nuostatos yra nesuderinamos su šių valstybių nacionaline teise, tradicijomis bei papročiais. Pasakytina, kad ši problema itin apsunkina minėtųjų žmogaus teisių sutarčių įgyvendinimo procesą valstybių nacionalinėje teisėje. Ieškant sprendimo būdų, kaip pakeisti ydingą valstybių išlygų sutartims darymo praktiką, autorė taip pat nagrinėja Vienos konvencijos dėl tarptautinės sutarčių teisės režimą, kokia apimtimi jis gali būti taikomas žmogaus teisių apsaugos sutarčių kontekste. Taip pat autorė šiame darbe analizuoja, kokios išlygos yra negaliojančios (prieštaraujančios sutarties objektui ir tikslui), kokia yra valstybių praktika darant prieštarą vertinamas išlygas ir kokios galėtų būti išeitys, siekiant apsaugoti žmogaus teisių apsaugos sutartis nuo išlygų, pažeidžiančių sutarčių tikslą ir objektą. Pažymėtina, kad valstybių praktika, susijusi su tokių nurodytų išlygų pasekmėmis, išlieka viena aktualiausių problemų tarptautinėje bendrijoje, siekiant įtvirtinti pagrindinius žmogaus teisių apsaugos standartus valstybių viduje ir apsaugoti labiausiai pažeidžiamas asmenų grupes.

Reikšminiai žodžiai: žmogaus teisės, lyčių lygybės problemos, išlygos, sutarties objektas ir tikslas, Vienos konvencija dėl tarptautinės sutarčių teisės, Konvencija dėl visų formų diskriminacijos panaikinimo moterims, Tarptautinis pilietinių ir politinių teisių paktas.

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